

**OPINION  
75-91**

April 30, 1975 (OPINION)

Mr. Ben Meier  
Secretary of State  
State Capitol  
Bismarck, ND 58505

Dear Mr. Meier:

This is in response to your letter of March 20, 1975, wherein you request an opinion of this office relative to Section 43-07-08(3) of the North Dakota Century Code, as amended. You submit the following facts and inquiry in your letter:

Section 43-07-08(3) of the North Dakota Contractor's Law exempts from the provisions of the Chapter a contractor "who contracts to furnish labor only and for an amount not in excess of five thousand dollars." On April 23, 1964, in a letter addressed to me your office answered the following question:

Please advise if it would be necessary for a person to secure a contractor's license under the following conditions:

1. Where a person is engaged in digging basements and furnishes only the equipment to dig the basement and the contract exceeds \$500.00 and does not exceed \$5,000.00.
2. Where a person assembles fabricated homes and furnishes only the tools needed to assemble the home and this contract exceeds \$500.00 and does not exceed \$5,000.00.
3. Where a person drills wells and furnishes only the equipment needed to do the drilling, excluding pipes or encasement of any kind, and the contract exceeds \$500.00 but does not exceed \$5,000.00.

Your office replied by quoting Sections 43-07-01(3), 43-07-02, and 43-07-08 of the North Dakota Century Code and stating the following conclusion:

Since all contracts exceed \$500.00 and such persons are not contracting to furnish labor only, it would appear that all three persons should secure contractor's licenses from your office.

Since this letter was received, many persons who work as painters, small job repair carpenters, roofers, cabinet makers, etc., have inquired as to their need for a contractor's license. This number has increased sharply in recent months largely due to inflation. In previous years there has been no question concerning their activities because their contract price was below the \$500.00 exemption granted in Section 43-07-02.

For example, according to the 1964 letter, as I read it, a painter who has a contract over \$500.00 but under \$5,000.00 would need a license if he as much as furnished his own paintbrush. It would seem then, that Section 47-03-08(3) really has no practical application since what independent small job laborer does not furnish some tools. If, on the other hand, the painter furnished the paint, I can see no reason to exempt such person from the requirement of obtaining a contractor's license since the paint becomes part of the finished product. Perhaps a more reasonable interpretation of Section 47-03-08(3) is that one falls within this exemption if he does not furnish materials that become part of the finished product. The question of whether or not he furnishes his own tools would be irrelevant.

With the foregoing as background information, I respectfully ask your opinion as to whether one would need a contractor's license to act in the following capacities:

1. A painter contracts to paint a house for \$600.00 and
  - (a) furnishes no tools or paint, or
  - (b) furnishes a paint brush and ladder, but no paint, or
  - (c) furnishes a paint brush, ladder, and paint.
2. A carpenter contracts to install new windows in an old house for \$600.00, and
  - (a) furnishes no tools or materials, or
  - (b) furnishes a hammer, saw, and other carpenter tools, but no windows, limber, or nails, or
  - (c) furnishes tools and materials.

As a secondary question, would it make any difference in any of the above situations, or in similar contracts over \$5,000.00, if the work was done at an hourly rate instead of a flat contract price (the hourly wage being the only thing that was settled prior to commencing the job)?

In the first instance we would note that Section 43-07-08 of the North Dakota Century Code, as amended, has not been changed since the previous opinion of this office of April 23, 1964, to which you have referred in your letter of inquiry. Further, we would note that while certain amendments have been made in other statutes referred to in the April 23, 1964 opinion, the changes do not alter the provisions which were applicable to the issues presented by your letter requesting that opinion. It would appear that the same basic issues are presented by your inquiry. We will, however, respond to the instant inquiry concerning the interpretation of Chapter 43-07 of the North Dakota Century Code, applying the principles and holding of the previous opinion to your office.

Your application of the holding of the 1964 opinion to the effect that a painter who has a contract over \$500.00 but under \$5,000.00 would need a license if he as much as furnished his own paintbrush would be correct. Section 43-07-02 of the North Dakota Century Code, as amended, subsequent to the 1969 amendment, provides as follows:

43-07-02. License required - Enjoining operation without license. No person shall engage in the business nor act in the capacity of a contractor within this state when the original contract or subcontract cost, value, or price exceeds the sum of five hundred dollars without first having a license as provided in this chapter. The secretary of state may request the attorney general to bring an action to enjoin any person from engaging in the business or acting in the capacity of a contractor within this state when the original contract or subcontract cost, value, or price exceeds the sum of five hundred dollars, unless the person is properly licensed.  
(Emphasis supplied)

The hypothetical instance which you have supplied with your letter of request can be determined not solely on the basis of whether such painter furnishes his own paintbrush but rather that the contract "exceeds the sum of five hundred dollars" as provided for by the statute. The exceptions to this requirement are set forth in Section 43-07-08 of the North Dakota Century Code, as amended, which has not been changed since the 1964 opinion was issued. That section provides as follows:

43-07-08. Exceptions. This chapter shall not apply to:

1. Any authorized representative or representatives of the United States government, the state of North Dakota, or any county, municipality, irrigation district, reclamation district or other political corporation; or
2. Any person who furnishes any fabricated or finished product, material or article of merchandise which is not incorporated into or attached to real property by such person so as to become affixed thereto.
3. Any person who contracts to furnish labor only and for an amount not in excess of five thousand dollars. (Emphasis supplied)

Accordingly, it would appear that the example you have given in your letter, would not conform to the exceptions to the requirements of the chapter, i.e., more than "labor only" would be furnished. If we were to make an exception for a single paintbrush, it would appear that a more difficult situation would arise in determining which tools would be sufficient to come within the exception and which would not be of sufficient significance. We do not feel that item 2 of Section 43-07-08 has pertinence to tools such as paintbrushes, etc., since the same are not materials of the sense apparently contemplated by the statute.

In answer to items numbered one and two of your letter of inquiry, we would note that only under the circumstances presented by 1(a) and

2(a) would the individual be furnishing "labor only" as specified by the statute providing for the exceptions, and would appear to be "for an amount not in excess of five thousand dollars.", also, as specified by the statute. Accordingly, it would appear that only under those circumstances would an individual be eligible for the exceptions prescribed by Section 43-07-08 of the North Dakota Century Code, as amended.

With regard to your second question, whether it would make any difference in any of the above situations, or in similar contracts over \$5,000.00, if the work was done at an hourly rate instead of a flat contract price, the hourly wage being the only thing settled prior to commencing the job, we would note that the entire concept of contracting is changed in such circumstances since the individual would not be an independent contractor but rather a hired employee of the person or entity so employing and would be subject to the constant direction and supervision of such employee. Such contract would not, in the true sense, contain a sum certain for a particular job as the only specification would be the hourly wage. We do not feel that Chapter 43-07 of the North Dakota Century Code would have relevance to such circumstances, if there is no contract and it is a mere hiring at an hourly rate.

We trust that the foregoing observations, comments and information adequately set forth the opinion of this office upon the matters submitted which are in accord with the opinion expressed in our letter of April 23, 1964.

Sincerely,

ALLEN I. OLSON

Attorney General